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No. 891

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, PETITIONER

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

CITATIONS

97960—38——1

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on June 28, 1938.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 70–75) is unreported. The opinion of the Circuit Court of Appeals (R. 88–92), is reported in 97 F. (2d) 784.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the Revenue Act of 1924, the value of property acquired by the decedent and his wife (who survived him) as joint tenants prior to the enactment of the Revenue Act of 1916 may be included in his gross estate to the extent that he furnished the purchase price therefor.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 13–18.

STATEMENT

The facts were stipulated (R. 12–15) and were found as stipulated (R. 71–74). They may be summarized as follows:

On June 17, 1924, W. Francis Jacobs predeceased his wife Elizabeth C. Jacobs (R. 71). At the time of his death they owned as joint tenants two pieces of real estate in Chicago, Illinois. The first parcel, situated on Humboldt Boulevard, was acquired by them on July 29, 1909 (R. 73–74), and the second, situated on Monticello Avenue, was acquired by them on November 23, 1917, subject, however, to an encumbrance of $17,000 [1] (R. 73).

[1] A deduction from the gross estate on account of such encumbrance was duly allowed. It was stipulated that, if the Monticello Avenue property should be excluded from the

With respect to the first parcel, the Commissioner determined that its value at the time of the decedent's death was $19,000 and that the funds used in its purchase were entirely those of the decedent. Hence he included the entire value in the gross estate (R. 73–74).

With respect to the second parcel, he found that the decedent had contributed fifteen-sixteenths and his wife one-sixteenth of its price. He determined that its value at the time of decedent's death was $65,000 and included fifteen-sixteenths thereof, or $60,937.50, in the gross estate (R. 73).

As a result of such inclusions, he determined that there was a deficiency in the estate tax of $1,796.23, and that the undischarged part of this was $1,347.17, which with interest in the sum of $148.18 made a total of $1,495.35. The respondent, as executrix of the decedent's estate, paid the deficiency and duly filed a claim for refund, which was allowed to the extent of $7.48 and rejected as to the balance (R. 72). The respondent thereupon brought this suit to recover such balance [2] (R. 2–9).

The sole question presented to the District Court related to the Commissioner's inclusion of the value of the two parcels of property in the decedent's

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decedent's statutory gross estate, the amount of the deduction should be reduced by $16,060.47 and the recovery of the respondent reduced accordingly (R. 74).

[2] The claim for refund (R. 56) and the petition (R. 9) seek to recover, respectively, $1,800.00 and $1,903.70. It is not disclosed how these figures are arrived at.

gross estate. That court held that the tax could be measured only by the value of the decedent's interest which passed at death and not by the value of the whole interest, which would include the value of the interest of the surviving tenant; also that the 1924 Act could not be given retroactive operation (R. 70). It therefore concluded that the tax on the estate of the deceased joint tenant could properly be measured only by one-half (the decedent's half) of the property held by them as joint tenants; and, so far as the Humboldt Boulevard property was concerned, that the Revenue Act of 1924 could not be given retroactive operation so as to tax more than one-half of the property to the decedent's estate. The court concluded that the respondent was entitled to judgment in the principal sum of $502.55 plus $306.24 interest, or a total of $808.79 [3] (R. 75). Judgment in that amount was accordingly entered (R. 75–76). The Government appealed (R. 77).

In the court below the petitioner admitted that under the decision of this Court in *Foster* v. *Commissioner*, 303 U. S. 618, the question involved as to the joint tenancy created in 1917, in the Monticello Avenue property, was erroneously decided by the District Court, and hence it reversed the judgment of the District Court. On the other hand, it affirmed the judgment of the District Court insofar

[3] The record does not disclose how the court arrived at the $502.55 figure.

as it applied to the Humboldt Boulevard property which was acquired in joint tenancy prior to the 1916 Act.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding:

1. That the estate tax imposed by Section 302 (e) of the Revenue Act of 1924 may not be measured by the entire value of property acquired in joint tenancy by the decedent and his wife prior to the enactment of the Revenue Act of 1916, even though the decedent furnished the entire consideration for its acquisition.

2. That Section 302 (e) of the Revenue Act of 1924, as applied in the circumstances of this case, with respect to the Humboldt Boulevard property, is unconstitutional.

3. That the value of only one-half (the decedent's half) of that property was includible in his gross estate.

4. In affirming the judgment of the District Court insofar as it relates to that property.

REASONS FOR GRANTING THE WRIT

Section 302 (e) of the Revenue Act of 1924 requires the inclusion in the gross estate of the value at the time of the decedent's death of all property to the extent of his interest therein held, *inter alia*, as joint tenant. It further provides however, that where such property or any part thereof, or part of the consideration with which such property

was acquired, is shown to have been at any time acquired by the other tenant from the decedent for less than a fair consideration in money or money's worth, there shall be excepted from the value of the property only such part of the value of such property as is proportionate to the consideration furnished by such other person. So far as material here, subdivision (h) provides that subdivision (e) shall apply to estates, interests, and rights made, created, arising, or existing before or after the enactment of the 1924 Act.

The property here in question was purchased entirely with funds of the decedent (R. 74). In affirming the District Court's judgment in respect of that property, the court below decided (R. 91) that, where the joint interest of the decedent and wife in Illinois real estate was created *prior* to the passage of the Revenue Act of 1916, only one-half of the value thereof could validly be included in the gross estate, notwithstanding that the jointly owned property was purchased by the decedent entirely with his own funds. This conclusion was reached because the court considered that, in respect of such joint tenancies, Congress did not have the power to give the Act retroactive operation.

1. This decision of the court below conflicts in principle with *Tyler* v. *United States,* 281 U. S. 497; *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577; *Helvering* v. *Bowers,* 303 U. S. 618; and *Foster* v. *Commissioner,* 303 U. S. 618, and creates and artificial hiatus in the law of estate taxation.

The cited cases establish that the full value of property, to the extent the consideration for its purchase was furnished by decedent, can be included in his gross estate if at his death it be held: in a tenancy by the entirety created after the enactment of the 1916 Act (*Tyler* case [4]); in a joint tenancy created after the 1916 Act (*Foster* case [5]); or in a tenancy by the entirety created before the 1916 Act (*Third National* and *Bowers* cases [6]). It would produce a surprising asymmetry in the Revenue Acts if a joint tenancy created before the enactment of the 1916 Act should alone be removed from the full reach of the estate tax.[7]

In *Gwinn* v. *Commissioner*, 287 U. S. 224, one-half of the value of property held in a joint tenancy created before 1916 was held properly included in the gross estate of the decedent, who had contributed one-half of the purchase price. This was the full measure of the statutory requirement,

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[4] To the same effect see *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160.

[5] To the same effect see *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756; *O'Shaughnessy* v. *Commissioner*, 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Commissioner* v. *Emery*, 62 F. (2d) 591 (C. C. A. 7th).

[6] To the same effect see *Robinson* v. *Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman* v. *United States*, *supra*; *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d); *Putnam* v. *Burnet*, 63 F. (2d) 456 (App. D. C.).

[7] In *Dimock* v. *Corwin*, 19 F. Supp. 56 (E. D. N. Y.) the full value of a joint tenancy created prior to 1916 was held includible in the gross estate.

since the decedent had contributed only one-half of the purchase price. However, the case cannot be said to be unequivocal authority for including the full value of property purchased by the decedent alone.

The departure of the court below from the decisions of this Court is made clearer when the *per curiam* decisions in the *Bowers* and *Foster* cases are examined more closely. In the *Bowers* case the Court sustained the inclusion in the gross estate of the full value of estates held by the entirety and created prior to 1916; this decision was solely on the authority of the *Tyler* case, which considered an estate by the entirety created after 1916. The *Tyler* case was thus expanded, as it was in the *Third National* case, to a decision that the full value of a tenancy by the entirety is taxable, no matter when created. In the *Foster* case the Court sustained the inclusion in the gross estate of the full value of a joint estate created after 1916; both the *Tyler* and *Gwinn* cases were cited as authority. Thus, the *Tyler* case was held applicable to a joint tenancy and the *Gwinn* case was held applicable to the full value of a joint tenancy. Both the *Tyler* case (as applied in the *Bowers* case) and the *Gwinn* case (as applied to the one-half of the estate contributed by the decedent) are equally applicable to estates created prior to 1916. It seems necessarily to follow that the full value of a joint tenancy created prior to 1916, as well as one created thereafter, may be included in the gross estate.

2. The court below seems to have departed from the plain implications of these decisions of this Court in part because of the decisions in *Knox* v. *McElligott*, 258 U. S. 546, and *Cahn* v. *United States*, 297 U. S. 691, and in part because of the characteristics of a joint tenancy under Illinois law (R. 90–91). Neither ground supports the conclusion reached.

The *Knox* case arose under the 1916 Act and the *Cahn* case under the 1918 Act. Neither contains retroactive provisions. In the *Knox* case this Court held that the 1916 Act could not be given retroactive application on the authority of *Shwab* v. *Doyle*, 258 U. S. 529, which in turn held that the contemplation of death section of the statute could not be given retroactive application in the absence of an express provision of the statute showing it to be the intention of Congress to do so. The *Cahn* case was decided *per curiam* on the authority of the *Knox* case. Accordingly, neither decision is applicable to the Revenue Act of 1924.[8] See Section 302 (h), *infra*, p. 14.

The court below differentiated estates by the entirety (which it said did not exist in Illinois) from estates of joint tenancy under the Illinois law, on

[8] *Griswold* v. *Helvering*, 290 U. S. 56, not relied on by the court below, involved the Revenue Act of 1921, which similarly contained no provision comparable to Section 302 (h) of the 1924 Act. The Commissioner, in deference to the ruling in the *Knox* case, sought only to include one-half of the value of a joint tenancy created before the 1916 Act and was sustained by this Court.

the ground that in estates by the entirety the title of each grantee is to the whole and no act of the one can destroy or affect the survivorship of the other, and that when one dies, he merely ceases to divide the enjoyment of the estate of which he was completely seized by virtue of the creative instrument; whereas a joint tenant under the Illinois law has the right to sell his interest or to mortgage it or to subject it to a lien, and that he could sue for partition. Under the Illinois law the title of each joint tenant was said to be to a share of the estate only.

If by thus differentiating between estates by the entirety on the one hand, and joint estates under the Illinois law on the other, the court below intended to imply that Illinois joint tenancies differ from joint tenancies at common law or in other states, we submit such implication is wholly unjustified. It is not questioned that the Illinois statute, which was approved June 30, 1919, L. 1919, p. 633 (Appendix, *infra*, p. 17), specifically provides for the creation of joint tenancies in real estate. It appears to be well settled in Illinois that a joint tenancy under the Illinois statutes has all of the common-law attributes of such tenancies.[9] It will

[9] The last expression of the Supreme Court of Illinois on the subject is its decision in the case of *Deslauriers* v. *Senesac*, 331 Ill. 437, where the court said (p. 440):

"An estate in joint tenancy can only be created by grant or purchase—that is, by the act of the parties. It cannot arise by descent or act of law. The properties of a joint estate are derived from its unity, which is fourfold: the unity

be noted that the present statute is but a reenactment of the Act of June 26, 1917 (see Appendix, *infra,* p. 18). A full exposition of the history of the 1917 Act and its meaning is found in *Svenson* v. *Hanson,* 289 Ill. 242, which expressly follows *Mette* v. *Foltgen,* 148 Ill. 357, 367, decided under the prior law. In the last mentioned case the court held that, upon the death of the wife, the estate in the property held in joint tenancy with her husband passed not to her heirs by inheritance but to the husband by survivorship. The basis of the decision is that the Illinois statute permits "parties to create the common law estate of joint tenancy, with its common law incidents, by expressly declaring in a deed running to two or more grantees, that the estate conveyed shall pass, not in tenancy in common, but in joint tenancy." Cf. *Lawler* v. *Byrne,* 252 Ill. 194, 197; *Liese* v. *Hentze,* 326 Ill. 633, 637. There appears, therefore, to be no basis for making a distinction between a joint tenancy under the California law, for example, considered in the *Foster* case, *supra,* and a joint tenancy under the Illinois law. The tax incidents are the same in both cases.

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of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided posession. 1 Sharswood's Blackstone's Com. book 2, p. 180; Freeman on Cotenancy and Partition (2d ed.), sec. 11; 1 Washburn on Real Prop. (6th ed.), sec. 855; 7 R. C. L. p. 811; *Gaunt* v. *Stevens,* 241 Ill. 542."

If, on the other hand, the decision of the court below were intended to be a holding that joint tenancies generally, at common law or under the ordinary statutes, were of a nature such that the full value of the estate, when created prior to 1916, even though acquired through the contributions of the decedent alone, could not be reached under the estate tax laws, it seems with equal clarity to be in error. The *Tyler* case was the ground of decision in the *Gwinn* case and, together with the latter decision, was the authority for the decision in the *Foster* case. If tenancies by the entirety are substantially indistinguishable for estate tax purposes from joint tenancies when dealing with joint tenancies created after the 1916 Act, or when dealing with joint tenancies created before 1916 where the decedent contributed only one-half of the purchase price, no reason appears why they should be differentiated in the case at bar.

3. The decision of the court below raises new doubts in a field of estate tax law which had been thought finally to have been clarified by the decisions of this Court. The Treasury Department advises that the principle involved is important in the administration of the estate tax.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1938.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the

value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of

administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner

from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other

joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Smith-Hurd Revised Statutes, Illinois, 1935, c. 76:

AN ACT to revise the law in relation to joint rights and obligations (Approved June 30, 1919. L. 1919, p. 633)

1. JOINT TENANCY DEFINED. § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no estate in joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy; and every such estate other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common and that all conveyances heretofore made, or which hereafter may be made, wherein the premises therein

mentioned were or shall be expressly declared to pass not in tenancy in common but in joint tenancy, are hereby declared to have created an estate in joint tenancy with the accompanying right of survivorship the same as it existed prior to the passage of an Act entitled: "An Act to amend section 1 of an Act entitled: 'An Act to revise the law in relation to joint rights and obligations,' approved February 25, 1874, in force July 1, 1874," approved June 26, 1917, in force July 1, 1917.

U. S. GOVERNMENT PRINTING OFFICE 1939